



Billing code 3510-33-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 748

[Docket No. 110331231-1608-02]

RIN 0694-AF19

Revisions to Authorization Validated End-User Provisions: Requirement for Notice of Export, Reexport or Transfer (In-Country) and Clarification Regarding Termination of Conditions on VEU Authorizations

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) proposes to amend the Export Administration Regulations (EAR) by adding a requirement for persons shipping under Authorization Validated End-User (VEU) to send written notice of such shipments to the recipient VEU. BIS further proposes to amend the EAR to clarify that when items subject to item-specific conditions under Authorization VEU no longer require a license for export or reexport or become eligible for shipment under a license exception, as set forth in the EAR, VEU's are no longer bound by the conditions associated with such items.

DATES: Comments must be received by no later than [INSERT 60 DAYS AFTER PUBLICATION DATE].

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (<http://www.regulations.gov>). The regulations.gov ID for this rule is: BIS-2012-0005. Comments may also be submitted via e-mail to publiccomments@bis.doc.gov or on paper to Regulatory Policy Division, Bureau of Industry and Security, Room 2099B, U.S. Department of Commerce, 14th St. and Pennsylvania Ave., NW, Washington, DC 20230. Please refer to RIN 0694-AF19 in all comments and in the subject line of e-mail comments.

FOR FURTHER INFORMATION CONTACT: Karen H. Nies-Vogel, Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th St. and Pennsylvania Avenue, NW, Washington, DC 20230; by telephone: (202) 482-5991, fax: (202) 482-3911, or e-mail: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

Authorization Validated End-User (VEU)

BIS amended the EAR in a final rule on June 19, 2007 (72 FR 33646), to create a new authorization for “validated end-users” (VEUs) located in eligible destinations to which eligible items may be exported, reexported, or transferred (in-country) under a general authorization instead of a license.

VEUs may obtain eligible items that are on the Commerce Control List, which are identified in Supplement No. 7 to Part 748 of the EAR, without having to wait for their suppliers to obtain export licenses from BIS. Eligible items may include commodities, software, and technology, except those controlled for missile technology or crime control reasons.

The VEUs listed in Supplement No. 7 to Part 748 of the EAR were reviewed and approved by the U.S. Government in accordance with the provisions of section 748.15 and Supplement Nos. 8 and 9 to Part 748 of the EAR. The End-User Review Committee (ERC), composed of representatives from the Departments of State, Defense, Energy and Commerce, and other agencies, as appropriate, is responsible for administering the VEU program. A unanimous vote by the ERC is required to authorize VEU status for a candidate or to add any eligible items to an existing authorization. A majority vote of the ERC is required to remove VEU authorization or to remove eligible items from an existing authorization.

In addition to U.S. exporters, Authorization VEU may be used in accordance with the provisions of the EAR by foreign reexporters and by persons transferring in-country. VEUs are subject to regular reviews by the U.S. Government to ensure that items shipped under Authorization VEU are used for civilian purposes. In addition, VEUs are subject to on-site reviews as warranted.

As of the date of this rule, pursuant to section 748.15(b) of the EAR, VEUs are located in the People's Republic of China (PRC) and India.

Amendments to Section 748.15 of the EAR

Prior Notification Requirement

Through this rule, BIS proposes amending the EAR by adding paragraph (g) – Notification requirement – to section 748.15 – Authorization Validated End-User. The new paragraph (g) would require persons exporting, reexporting, or transferring (in-country) under Authorization VEU to send written notification to the recipient VEU with details about their shipment within seven days of the shipment. Details that would be required in the notification include a list of the contents of the shipment and the quantity of such items that have been or will be shipped to the respective VEU under Authorization VEU, as well as a list of the applicable Export Control Classification Numbers (ECCNs) for items included in the shipment under Authorization VEU.

The purpose of this proposed new requirement is to enhance the ability of VEUs to comply with the requirements of the VEU program. This amendment to the EAR is not the result of non-compliance with VEU requirements by existing VEUs. Rather, BIS proposes making this change at the request of VEUs. Some VEUs have informed BIS that compliance is challenging when they receive items under multiple authorizations, but are unable to determine which authorization is used for each shipment, and thus determine which set of conditions applies to the items received in each shipment. Because items may be shipped to VEUs under different forms of authorization (*e.g.*, individual licenses, Special Comprehensive Licenses, and Authorization VEU), VEUs may receive items classified under the same ECCN but shipped under more than one form of authorization. In addition, each form of authorization may be accompanied by different conditions with which end-users must comply. With this amendment to the EAR, BIS intends to improve the ability of VEUs to determine which authorization their suppliers utilized.

This will enable VEUs to better determine which set of conditions governs their use of the received item(s) more efficiently, thereby increasing the VEUs' compliance.

BIS is not mandating the form of communication (*e.g.*, fax, e-mail, letter) for the notification, but does require that it be in a written format. As noted above, the notification must be conveyed to the VEU within seven calendar days of shipment to the VEU. Exporters, reexporters and VEUs are required to maintain the notifications they receive pursuant to their recordkeeping requirements.

Clarification Regarding Termination of Conditions on VEU Authorizations

In addition, BIS proposes amending section 748.15 – Authorization Validated End-User – by adding paragraph (h) – Termination of Conditions on VEU Authorizations. The new paragraph (h) clarifies that VEUs who are subject to item-specific conditions and have received items subject to such conditions under Authorization VEU would no longer be bound by the conditions associated with the items if the items no longer require a license for export or reexport to the PRC or India (depending on the VEU's location) or become eligible for shipment under a license exception to the destination. This proposed amendment would be the same, in effect, as existing section 750.7(i) (Terminating license conditions), which generally applies to exporters and reexporters who have shipped under license. In addition, a new paragraph (i) is added to section 748.15 to remind exporters that records requirements for shipments that were made under Authorization VEU prior to the removal of a license requirement or the availability of a license exception remain subject to the review requirements of paragraph (f)(2) of section 748.15 on and after the date that the license requirement was removed or the license exception became applicable.

Since August 21, 2001, the Export Administration Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), as extended most recently by the Notice of August 12, 2011 (76 FR 50661, August 16, 2011), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.
2. Notwithstanding any other provisions of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This proposed rule involves information collections previously approved by the OMB under control number 0694-0088, “Multi-Purpose Application”, which

carries a burden hour estimate of 45.8 minutes to prepare and submit form B18-748, which involves requirements in connection with Authorization VEU. BIS revised the burden hour estimate shown for the 0694-0088 collection by two minutes to include the notification requirement proposed in this rule. This revision does not represent a significant increase in burden hours for submitting information under the collection. Also, the notification requirement proposed in this rule is not expected to result in an increase in license applications submitted to BIS should the agency issue the amendment to the EAR in a final rule subsequent to the close of the proposed rule comment period.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities.

Number of Small Entities

This proposed rule would affect exporters and reexporters shipping to VEUs, as well as persons making in-country transfers to VEUs, under Authorization VEU. Currently, BIS does not collect data on the size of entities that export, reexport, or transfer in-country under Authorization VEU. Although BIS is unable to estimate the number of small entities that would be affected by this rule, it does acknowledge that this rule will impact some unknown number.

Economic Impact

This proposed rule requires exporters and reexporters shipping to VEUs, as well as persons making in-country transfers to VEUs, under Authorization VEU to provide written notification to approved VEUs about VEU shipments. It would not require extensive efforts by exporters or reexporters, or persons making in-country transfers. The proposed action is designed to coincide with other standard communications that exporters and reexporters, regardless of size, provide to their customers or parties to the transaction regarding, among other things, the description of items, sales terms, and logistics. Specifically, this rule would require only that exporters and reexporters shipping eligible items under Authorization VEU to the finite number of approved VEUs at their “Eligible Destinations” in the PRC and India ensure that those VEUs are notified in writing within seven days of shipping such items under the Authorization. Practically, BIS does not anticipate that any significant amount of time or other resources would be used to perform the proposed required action. BIS estimates that the notification requirement proposed in this rule will increase the burden hour estimate by two minutes per respondent. Also, the notification requirement proposed in this rule is not expected to result in an increase in license applications submitted to BIS should the agency issue the amendment to the EAR in a final rule subsequent to the close of the proposed rule comment period.

The proposed requirement is intended to facilitate compliance with the EAR in general and Authorization VEU in particular. The proposed requirement will facilitate the VEUs’ ability to comply with the specific conditions placed on their qualifications as VEUs and distinguish those conditions from conditions placed on items received under other authorizations. This will enhance accountability and ensuring effective control of items shipped under Authorization VEU and other authorizations.

In addition, this action is likely to enhance the attractiveness of shipping “Eligible Items” under Authorization VEU for exporters and reexporters, or persons making in-country transfers. This potential benefit outweighs any perceived inconvenience to exporters and reexporters, or persons making in-country transfers, who ship under Authorization VEU, as they retain the option to ship under an individual validated license.

In this rule, BIS also proposes to amend section 748.15 – Authorization Validated End-User – by adding paragraph (h) – Termination of Conditions on VEU Authorizations. This proposed amendment would clarify that VEUs who are subject to item-specific conditions and have received items subject to such conditions under Authorization VEU would no longer be bound by the conditions associated with the items if the items no longer require a license for export or reexport to the PRC or India (depending on the VEU’s location) or become eligible for shipment under a license exception to the destination. This proposed amendment would be the same, in effect, as existing section 750.7(i) (Terminating license conditions), which generally applies to exporters and reexporters who have shipped under license.

For the reasons stated, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities.

List of Subjects in 15 CFR Part 748

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, part 748 of the Export Administration Regulations (15 CFR Parts 730 - 774) is proposed to be amended as follows:

PART 748 – [AMENDED]

1. The authority citation for 15 CFR Part 748 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011 (76 FR 50661 (August 16, 2011)).

2. Section 748.15 is amended by adding paragraphs (g), (h) and (i) to read as follows:

§ 748.15 Authorization Validated End-User (VEU).

* * * * *

(g) *Notification requirement.* Exporters and reexporters shipping under Authorization VEU and persons transferring (in-country) under Authorization VEU are required to provide the validated end-users to whom they are shipping notice of the shipment. Such notification must be conveyed to the VEU in writing and must include a list of the contents of the shipment and a list of the ECCNs under which the items in the shipment are classified, as well as a statement that the shipment is, will be, or was made pursuant to Authorization VEU. Notification must be made within seven calendar days of the export, reexport or transfer (in-country) to the VEU. Exporters, reexporters and VEUs are required to maintain the notifications they receive in accordance with their recordkeeping requirements.

(h) *Termination of Conditions on VEU Authorizations.* VEUs that are subject to item-specific conditions and have received items subject to such conditions under Authorization VEU are no longer bound by the conditions associated with the items if the items no longer require a license

for export or reexport to the PRC or India, as applicable, or become eligible for shipment under a license exception to the destination. Termination of VEU conditions does not relieve a validated end-user of its responsibility for violations that occurred prior to the availability of a license exception or prior to the removal of license requirements.

(i) *Records*. Records of items that were shipped under Authorization VEU prior to the removal of a license requirement or the availability of a license exception remain subject to the review requirements of paragraph (f)(2) of this section on and after the date that the license requirement was removed or the license exception became applicable.

DATED: April 10, 2012

Kevin J. Wolf

Assistant Secretary

for Export Administration

